

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

VALVE CORPORATION,)	CV23-01016-JNW
)	
Plaintiff,)	SEATTLE, WASHINGTON
)	
v.)	September 20, 2024 -
)	10:00 a.m.
LEIGH ROTHSCCHILD, ROTHSCCHILD)	
BROADCAST DISTRIBUTION)	
SYSTEMS, LLC, DISPLAY)	MOTION HEARING
TECHNOLOGIES, LLC,)	
PATENT ASSET MANAGEMENT, LLC,)	
MEYLER LEGAL, PLLC, AND SAMUEL)	
MEYLER,)	
)	
Defendants.)	
)	

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE JAMAL N. WHITEHEAD
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Dario Machleidt
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For the Defendants: Donald R. McPhail
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1 THE COURT: Please be seated.

2 This is the matter of Valve Corporation versus Rothschild, et
3 al., Cause No. CR23-1016, assigned to this court.

4 Will counsel please rise and make their appearances for the
5 record?

6 MR. MACHLEIDT: Your Honor, Dario Machleidt on behalf of
7 Valve. Starting at the end of the table, we have Chris Damition
8 and then Kate Geyer, both, also, outside counsel for Valve, and
9 then next to me is Chris Schenck, in-house counsel for Valve.

10 THE COURT: Very good. Good morning, all.

11 MS. GEYER: Good morning.

12 MR. SCHENCK: Good morning.

13 MR. MCPHAIL: Don McFail of Merchant & Gould for all of
14 the defendants. Good morning, Your Honor.

15 THE COURT: Good morning.

16 All right. Well, we are here this morning on defendants'
17 motion to dismiss. This has been pending longer than I'd like,
18 so I do apologize for that, but we are here today. I'm not going
19 to rule from the bench, but I do suspect that we will have a
20 ruling for you all in very short order.

21 So with that, let's hear from defendants here. We will start
22 with defendants, we will go to plaintiff, and then we will give
23 defendants the final word.

24 MR. MCPHAIL: Thank you, Your Honor. Thank you very
25 much.

1 This case is, to be blunt, a monumental waste of the court's
2 resources and time. What could have been resolved with a simple
3 e-mail has been turned into a federal case by Valve. There's no
4 reason that we should be here; there's no reason we should be
5 using the court's time; there's no reason so many lawyers should
6 be in this courtroom.

7 In terms of the declaratory judgment action, the case law is
8 very, very clear that an enforceable covenant not to sue divests
9 this court of jurisdiction on patent validity and enforceability
10 claims. They have an enforceable covenant not to sue. To the
11 extent that is not sufficient for them, we have offered to give
12 them whatever covenant they need, we will put in any language
13 they want, but there are no grounds for this court to be looking
14 at the validity or enforceability of any patent in this matter.

15 THE COURT: Well, I mean, to the extent there are
16 grounds, I mean, isn't this a case of Rothschild perhaps creating
17 this case or controversy? I mean, that's certainly what they
18 have alleged here. You're right, I mean, I have looked at the
19 case law about covenants not to sue, and I think it's fairly
20 clear in its operation, but in looking at those cases, I really
21 struggle to find one that matched up with this scenario, where we
22 have got agreements that were made, expectations settled between
23 the parties, and then the patent holder sending out demand
24 letters, detailed demand letters at that, perhaps creating a case
25 or controversy. So what am I do with that? I mean, we have got

1 affirmative acts by the Rothschild defendants perhaps putting the
2 patent '221 into play.

3 MR. MACHLEIDT: Even with the letters, with the covenant
4 not to sue, they could never have brought suit under the '221
5 patent, right? That would have been their immediate defense.
6 They could have dismissed any action for infringement on that
7 covenant not to sue. We would have had no response to it.

8 What you have here is an unfortunate situation of a couple of
9 clerical errors, the first due to an attorney who was very ill
10 and passing at the time, and the second to a new attorney to the
11 whole field. Each time -- in the first instance, they resolved
12 it by sending a letter. The case was immediately dismissed.
13 They could have done the same thing here on the demand letters,
14 just a simple e-mail back saying: Guys, here's a reminder, we
15 have a license to this patent. That would have been the end of
16 it. But, instead, they have decided they want to file a case and
17 bring us all here into court.

18 THE COURT: I mean, is that really their burden?
19 Perhaps with the earlier action on the '723 patent, maybe, but we
20 have got perhaps a repeated course of conduct on the part of the
21 Rothschild defendants in asserting -- alleging, I should say,
22 infringement against someone that has a license. So, again, what
23 am I do with that when I'm looking at the totality of the
24 circumstances?

25 MR. MCPHAIL: Well, in that letter you're referring to,

1 the June 2023 letter, there were three patents raised. In two of
2 those, there were actually colorable claims for infringement. It
3 was only one of those patents where they had a license, the '221.
4 So, again, I don't deny that it was an error on the part of the
5 Rothschild defendants to even include that in the letter, but it
6 could have been resolved by them just responding again. Is it
7 their burden to do that? I think it's their burden to avoid
8 bringing an action where there's no real damage, there's no real
9 controversy other than the fact that they're annoyed. And I'm
10 sorry they're annoyed. We've promised we will never do it again.
11 I can promise you it will never happen again. But it did happen
12 twice.

13 THE COURT: The law would couch it in terms of
14 reasonable apprehension of litigation. I mean, I think that's
15 what they've have alleged, in looking at these letters and the
16 course of conduct, is a reasonable apprehension.

17 So tell me this, I mean, if this case were to proceed, would
18 the Rothschild defendants raise counterclaims of infringement?

19 MR. MCPHAIL: Yes, in this instance, we would. We would
20 raise breach of contract and patent infringement.

21 THE COURT: All right. What else would you like to tell
22 me?

23 MR. MCPHAIL: In terms of the contract actions, we've
24 just been sort of talking about that. I will concede to you that
25 there was a breach of the contract in 2022, but that breach was

1 remedied promptly, and they never bothered to raise anything
2 about it until the June letters and this whole action was
3 brought. We think they waived any right to complain about it,
4 but even if they hadn't, there were no damages that arose from
5 that. It was inconvenience. They wrote a letter back to us,
6 that's it. I don't see how there's any damages there even if
7 there was a technical breach of the contract. Again, no reason
8 for this court to be dealing with this.

9 And in terms of the Washington State Patent Troll Act, I have
10 to confess, I'm walking in uncharted territory. It's my
11 understanding this is the only case that has ever been brought
12 that invokes that statute in a private party action. My
13 understanding is the only other action was brought by the
14 Washington State Attorney General against *Landmark*. And this
15 case is not *Landmark*. Mr. Rothschild is not *Landmark*. He is an
16 inventor himself. He is a prolific inventor. He has a lot of
17 his own patents and he's acquired a lot of patents. He learned
18 the value of patents. And I'm not going to deny that he does try
19 to enforce those patents when he thinks there's an opportunity to
20 do so, but that in and of itself is not a bad act. He has
21 justifiable grounds. Investigations are done before any letters
22 are ever sent. There are claim charts usually associated with
23 his letters. This isn't frivolous. This isn't Shipping and
24 Handling sending out thousands of letters and settling for \$5,000
25 a pop. These are legitimate claims, to the extent they exist,

1 and that's the sort of thing that the Washington State Troll Act
2 I think is supposed to be permitting. It shouldn't be
3 foreclosing it.

4 If you take their position, it's going to have a tremendous
5 chilling effect on patent owners. They will be unable to send
6 out notice letters without fear that all of a sudden someone is
7 going to raise a private cause of action under the Washington
8 State Patent Troll Act. So we don't think that has any grounds
9 to be a part of this case either and that should also be
10 dismissed.

11 And the final thing is the issue of damages. To the extent
12 they're entitled to damages under the settlement agreement from
13 2016, they haven't actually suffered any damages. They have been
14 inconvenienced, but their business has not been harmed in any
15 way. They have suffered no actual loss. There's nothing here
16 for the court to judge on. There's nothing here for the court to
17 give them. They, at best, have some attorneys' fees, but that in
18 and of itself is not a damage. And so we think this case should
19 be dismissed. There's no reason it should be here.

20 THE COURT: All right.

21 MR. MCPHAIL: Thank you.

22 THE COURT: Thank you.

23 MR. MACHLEIDT: Your Honor, Dario Machleidt on behalf of
24 Valve.

25 Can you see the slides? And you should have a hard copy with

1 you.

2 THE COURT: Yes, I have got them in front of me now.
3 Thank you.

4 MR. MACHLEIDT: Your Honor, there's plenty that defense
5 counsel just went into that I will respond to, but I want to
6 begin with this point: The actions of Mr. Rothschild, his
7 companies, and his lawyers are exactly the type of conduct that
8 the Washington Troll Act is meant to stop. They repeatedly
9 asserted licensed patents against Valve despite the fact that
10 Valve sent them, sent their lawyer, the license agreement;
11 therefore, reminded them about the agreement. They still kept
12 going after Valve again and again. I understand that the
13 defendants wish Valve had not brought this lawsuit, but nothing
14 that they have argued, nothing that they have raised, justifies
15 dismissing the case, certainly not at this stage.

16 Your Honor, I do think it helps to begin with the cause of
17 action for a violation of the Washington Troll Act. I think when
18 you look at the facts and the evidence that we have alleged, that
19 you see in the complaint, that gives rise to our Troll Act claim,
20 that sort of colors every other cause of action and allows you to
21 see why none of their arguments in favor of dismissal carry any
22 weight.

23 THE COURT: Okay. Yeah, I mean, I will certainly hear
24 you out if you're saying this is going to contextualize other
25 arguments, but, I mean, you know, starting with jurisdiction

1 seems like the logical place to me. I mean, they're arguing that
2 the court is divested of jurisdiction by the covenant not to sue,
3 that there isn't a case or controversy. So I'll listen to you
4 now and I will look at the slides, but, you know, it's important
5 that we make that connection because that's really the threshold
6 question: Can I hear this?

7 MR. MACHLEIDT: Absolutely, Your Honor. I'm happy to
8 ping-pong to the relevant part of the slides because, I agree, it
9 is certainly a threshold question.

10 And I think the way you phrased it to defense counsel is
11 exactly right. The court takes into account the totality of the
12 circumstances. That's what the Federal Circuit cases talk about.
13 We have *Gen-Probe* here on the slide, that's one of the examples,
14 and that's why the covenant not to sue never starts and stops the
15 inquiry. You have to look at everything around it. And as you
16 pointed out here, we have breaches, we have -- Valve has
17 plausibly alleged material breaches of the license agreement and,
18 therefore, the covenant not to sue. That did not happen
19 factually in the *Gen-Probe* case because -- I'll admit, I have not
20 found a published decision where the licensor, not once but
21 multiple times, breached the license by going after the licensee
22 either with a lawsuit, here, for example, the *Display*
23 *Technologies* case on the '723 patent. That was a breach.
24 Defense counsel -- and I respect that he admitted it. That was a
25 breach. That takes this case out of all of the decades of

1 history that the defendants referred to in their briefing about
2 the importance of a covenant not to sue.

3 And the same is true for the letter that Mr. Meyler sent in
4 June of 2023. That was, yet again, another breach of the
5 agreement and, therefore, the covenant not to sue. And you see
6 the language that the Federal Circuit talks about here in
7 *Gen-Probe*. When you have a material breach, all bets are off.
8 You cannot breach that agreement and then in court rely on it to
9 the detriment of the licensee. It's not a heads-they-win-
10 tails-we-lose situation. That's why this court absolutely has
11 declaratory judgment jurisdiction.

12 Valve had a reasonable apprehension of suit. You will see
13 the timeline, it's in the slides, and I will touch on it in a
14 moment, but this was not a one-off instance where an errant
15 letter went to the wrong party. Mr. Rothschild, his company, and
16 his lawyers know what they were doing. They are very experienced
17 in patent assertion. I believe defense counsel called Mr.
18 Rothschild a prolific inventor. I have no opinion on that at the
19 moment. He is certainly a prolific patent asserter, and they
20 went after Valve again and again and again.

21 When you look at the totality of the circumstances, this
22 court has declaratory judgment jurisdiction to hear Valve's
23 claims for both invalidity and unenforceability.

24 I will answer any questions you have, of course, Your Honor,
25 but if I may add --

1 THE COURT: Go ahead.

2 MR. MACHLEIDT: -- not once have the defendants
3 responded to our arguments about *Gen-Probe* and the fact that even
4 the Federal Circuit has focused on the relevance of a material
5 breach. Perhaps defense counsel will say something in his
6 rebuttal. You mentioned he gets the last word. If he does,
7 whatever he says about *Gen-Probe* will be the first that Valve has
8 heard of it. They simply cannot get around the fact that they
9 have created the situation here and they have to contend with it.

10 THE COURT: All right. And I think that's what I'm
11 coming back to, just sort of the fundamental nature of what it is
12 that we're dealing with here. I mean, is there truly a
13 reasonable apprehension, given that we have a broad, robust
14 covenant not to sue? I mean, it simply took an e-mail, as it
15 relates to the '723 litigation, to get the Rothschild defendants
16 to back off.

17 So, I mean, is there a case or controversy around, you know,
18 the validity of the patent or am I really looking at a lawsuit
19 about a breach of a prior settlement agreement and perhaps
20 enforcement of this Washington statute, the Patent Troll statute?
21 I mean, is this something that should be in state court?

22 MR. MACHLEIDT: No, Your Honor.

23 And to your broad question, the answer is yes, Valve's causes
24 of action fit under everything you just said. This is a
25 declaratory judgment case. The facts justify that. It is also a

1 case about breach. It is also a case about the Washington Troll
2 Act.

3 And to sort of get to the first point you touched on, this,
4 right here on the slide, is the Mr. Meyler letter from June of
5 2023. I believe the question you asked was, you know, is there
6 an apprehension of suit, and you certainly touched on that when
7 speaking with defendant counsel. The answer is yes. You see
8 that in this letter. And mind you, this letter came after ample
9 history between, on the one hand, Rothschild, his companies, and
10 his lawyers, and, on the other hand, Valve. That was not the
11 first correspondence. This comes after Valve had already
12 reminded Mr. Meyler about that license agreement. You're right,
13 it did eventually lead to the dismissal without prejudice of the
14 *Display Technologies* case, but this comes not at the beginning of
15 the parties' interactions, it comes at the end. And what you
16 have -- it's a short letter, which is great for me because you
17 can see it right here on the slide -- Mr. Meyler goes after Valve
18 on behalf of Rothschild yet again. And this is a highly
19 aggressive, assertive letter. Mr. Meyler references the fact
20 that there are claim charts attached to this letter. He's
21 certainly right. They're in the record at the docket sites.
22 There were three claim charts for three patents. One of those
23 three was the '221 patent. It is expressly licensed in the
24 parties' license agreement. I believe when you look, it is
25 Patent No. 12. You don't have to do any patent analysis. The

1 number is right there. Mr. Meyler attached a claim chart
2 accusing Valve of infringement of the '221 patent, and it refers
3 to Valve as the defendant. To avoid any doubt, Mr. Meyler says
4 these charts "have been prepared in anticipation of litigation,"
5 and the letter was sent on June 21st and wanted a response by
6 June 30th. That's nine days. It's six business days.
7 Mr. Meyler ends this letter by saying if we don't hear from you
8 within those nine days -- those six business days -- we're going
9 to assume that you'd "prefer to litigate."

10 Again, going back to the totality of the circumstances that
11 matters here, knowing that this letter, aggressive on its own,
12 came after ample history between the parties, this gives rise to
13 your main question, sort of the threshold question, this letter
14 gives rise to that declaratory judgment jurisdiction.

15 And if I may, Your Honor, I have more of a timeline
16 beforehand, but let me end with -- or let me talk about this
17 timeline right here. Mr. Schenck reminded me of something that
18 I -- let me talk about it once more, confirm it again. Defense
19 counsel also said, in response to your question -- and I'm so
20 glad you asked it -- if this case proceeds, the defendants will
21 assert the '221 patent against Valve. And by the way, globally,
22 the fact that, in theory, technically and legally, you know, that
23 Valve would win a lawsuit because it has the defense of the
24 agreement, that's not the question under the Declaratory Judgment
25 Act and whether there's a reasonable apprehension of suit, right?

1 The answer is, there is. And when Valve was given that June
2 letter that said we're coming after you once more, early July,
3 Valve decided to stop being the punching bag, to stop being kind
4 of sort of on its back, on its heels, and it said, no, enough is
5 enough. That letter was sort of the one assertion too many, and
6 that's why we're here. And you see it in the complaint. We have
7 alleged the whole history that leads us to that letter. But
8 that's why Valve said enough is enough and it brought this case.

9 THE COURT: On the issue of damages, that was an issue
10 that was raised by counsel, arguing the absence of in this case.
11 What would you say to that?

12 MR. MACHLEIDT: I have two answers to that specific
13 question. The first is, Valve paid real money to get what should
14 have been peace between it and Rothschild. It did not get what
15 it paid for, right? That is a measure of damages.

16 The other thing I'll say is any time you have lawyers
17 involved, damages are at play. It takes time, effort, and money
18 to ensure that whether you respond or not, or whatever course of
19 conduct you go into, it costs you something to do that. So there
20 certainly are damages.

21 Now, I will also add this: At the 12(b)(6) stage, the
22 extent, the amount, the scope, that's not teed up here. What I
23 will say is I think defense counsel, what they did brief is this
24 notion that under the agreement, both -- I think he said waiver
25 and then he also said that the agreement forecloses damages. I

1 won't put words in his mouth, but they briefed it, and he brought
2 that back up.

3 You just asked me about damages. So let me make sure that I
4 touch on this. This is Section 9.5 of the parties' license
5 agreement. This is what the defendants rely on to say that even
6 if everything we allege is sufficient to get past this stage,
7 should we go forward, we're not entitled to damages under the
8 contract. That's simply not true.

9 You see the highlighted sentence from Section 9.5 and then
10 there's the red underline. This section talks about damages
11 arising -- or a lack of damages arising out of the agreement and
12 the licensed products. This is a term that appears quite
13 commonly in license agreements of this nature, where the
14 licensor, meaning Rothschild, doesn't want to get sued if one of
15 Valve's customers, who is technically licensed under this
16 agreement because the parties were supposed to have peace, that
17 Rothschild doesn't want to get sued because that customer, who
18 knows, trips and falls and one of Valve's products injures that
19 person. That is what this section is dealing with.

20 We have underlined in red that last little bit, "and the
21 Licensed Products," because it's important. In their briefing,
22 they just use little ellipses and they pretend that Section 9.5
23 talks about no special punitive or exemplary damages relating to
24 the agreement. That's not what this section talks about. It's
25 exactly as I just mentioned.

1 Section 6.2 leaves no doubt. When there's breach, when we
2 have a fight like what we have here, both sides can go after
3 damages. So this absolutely is a case where damages exist and
4 are in play.

5 THE COURT: All right. Thank you.

6 MR. MACHLEIDT: Your Honor, I'm going to look to my
7 colleagues, if I may have ten seconds? Because we kind of jumped
8 around, I want to make sure --

9 THE COURT: Sure.

10 MR. MACHLEIDT: -- that defense counsel didn't raise
11 something that I have forgotten to.

12 There's more in the briefing. I'm happy to talk about all of
13 those other issues as well. I'm here to respond. I want to make
14 sure that I do that.

15 THE COURT: Yes. We have certainly read all the briefs,
16 looked very closely at the case law. So, yeah, take a moment to
17 confer with co-counsel. There's nothing wrong with a co-counsel
18 assist, but you have addressed the issues that are front and
19 center for the court.

20 MR. MACHLEIDT: And, actually, before I walk over there
21 and do that -- and thank you for that, Your Honor -- I recall
22 defense counsel pointed out he wasn't aware of a private right of
23 action case under the Troll Act. I understand why he said that.
24 There's certainly the *Landmark* case. He mentioned that
25 Rothschild is not *Landmark*. And somewhere on one of my slides, I

1 think there's something that relates exactly to that.

2 Sure, no two patent owners are exactly the same, but what you
3 see here, and what we have mentioned in the complaint, is that
4 Mr. Rothschild, through his companies -- himself, his companies,
5 his lawyers -- he is a highly assertive person through his
6 company's entity. Recently, just recently, I believe,
7 Mr. Rothschild, through his various companies, surpassed the
8 1,200 mark in terms of number of lawsuits brought. Now, when I
9 think about the *Landmark* case, I believe there's reference to
10 about a thousand, maybe 1,800, demand letters being sent out by
11 *Landmark*. Mr. Rothschild had cracked a thousand when it comes to
12 actual lawsuits. I would like this case to proceed, and we will
13 see if discovery proves how many demands. I assume it's a
14 funnel, many more demands than lawsuit, but there are very close
15 parallels between the parties in *Landmark* and Mr. Rothschild.

16 Also, yes, the *Landmark* case is a few steps ahead of us, but
17 I know in California, for example, I believe Microsoft, in maybe
18 the Northern District, did bring a private right of action case
19 against a patent owner under the Washington Troll Act. A
20 procedure there led to that claim sort of stopping early. But
21 parties have certainly brought the type of case that we have
22 here.

23 With that, Your Honor, may I confer real quick, make sure I'm
24 not missing anything?

25 THE COURT: Of course.

1 MR. MACHLEIDT: Thank you.

2 Your Honor, briefly, my colleagues reminded me that waiver
3 kind of at least was touched upon. I believe it's Section 11.5
4 of the agreement. It says that the parties, even if facts arise
5 that, you know, in other circumstances, would potentially allow
6 somebody to argue waiver, the contract says there is no waiver.
7 That aside, waiver, especially when it comes to waiver by
8 inaction, is a highly fact-specific analysis that, for that
9 reason as well, certainly cannot be resolved at this stage.

10 Your Honor, with that, I'm always happy to answer your
11 questions. If I have to, I'll ask your indulgence for a
12 surrebuttal. But with that, I will give it back to defense
13 counsel.

14 THE COURT: All right. Thank you.

15 MR. MACHLEIDT: Thank you, Your Honor.

16 MR. MCPHAIL: Thank you, Your Honor. I will try to be
17 brief.

18 One thing I think is rather interesting here is they make a
19 great deal of Mr. Rothschild as a troll, but at no point have
20 they ever bothered to file a complaint with the Washington
21 Attorney General. It's an online form. I mean, it would have
22 taken them no time at all, if they thought there was a legitimate
23 beef here, if they thought there was a legitimate violation of
24 the Act, to report it and let the Washington State Attorney
25 General do the work for them, right? He's doing it against

1 *Landmark*. If Rothschild is so bad, then he would do it against
2 Rothschild. Or perhaps maybe they did and the Attorney General
3 decided there was nothing to do here, there was not a basis for
4 acting, right? We don't know that right now. If this case goes
5 on, discovery will tell.

6 They talk about a reasonable apprehension of suit. Your
7 Honor has brought that up as well. There may be an apprehension,
8 but it's not reasonable. And I think the '723 showed that. If
9 there was an error made and the suit was filed, it only took a
10 letter for that to go away immediately. No harm, no foul.

11 The Meyler letters. Two out of those three parties that he
12 mentioned in that letter had legitimate claims and eventually
13 brought suit against Valve on those claims. He made a clerical
14 error on the '221 patent. Again, all it would have taken was a
15 single letter to say, hey, not about QTI, not about the other
16 one, but at least this patent we have a license to, so you need
17 to drop it, and then it would have been two out of three they
18 were arguing about. But, instead, we get this lawsuit.

19 Even if they're entitled, as I've said, to claim damages
20 here under the contract, I don't think they have actually been
21 damaged. I don't think they have actually been harmed. Lawyers'
22 fees are not damages.

23 And, finally, being assertive in and of itself, as they've
24 talked about Mr. Rothschild, doesn't make you a patent troll.
25 *Landmark* wrote a lot of letters. That's not a good thing.

1 Rothschild legitimately brought suits. That, under the Patent
2 Troll Act, is supposed to factor into being a legitimate -- a
3 good factor, right, that you are actually able to enforce your
4 claims. The fact that he has filed so many suits should be a
5 factor in his favor, not weighed against him.

6 Thank you.

7 THE COURT: I guess my final question to you is, you
8 know -- I guess I will just state it plainly -- what's your best
9 case on the declaratory judgment issue? There's plenty of case
10 law about the operation of the covenant not to sue. I think
11 that's clear. But the posture here is not like the cases that
12 are cited in the brief, where there's litigation and then the
13 parties come to an agreement that results in a covenant not to
14 sue and the court finds that it's divested of its jurisdiction on
15 the declaratory judgment action. We have got a situation here
16 where there was a covenant not to sue and then there are these
17 subsequent acts. I couldn't find a case.

18 MR. MCPHAIL: We will give them any covenant they want.
19 And that act in and of itself, me standing here telling you that,
20 is sufficient to divest this court of jurisdiction. I will give
21 them any covenant they want not to sue. There is no reason for
22 this case to go forward. We will put whatever language they want
23 in writing and have it signed and notarized. But we are willing
24 during this case to give them whatever covenant they want to take
25 care of this. There was never, ever any intent to enforce the

1 '221 against them.

2 THE COURT: All right.

3 MR. MCPHAIL: Thank you.

4 THE COURT: Thank you.

5 MR. MACHLEIDT: Your Honor, because we seem to be making
6 good time, may I surrebut? And I'm always happy to let Mr. --

7 THE COURT: Briefly. Yeah, briefly.

8 MR. MACHLEIDT: So many of their arguments -- Dario
9 Machleidt on behalf of Valve.

10 So many of their arguments ignore the 12(b)(6) standard. I'm
11 going to begin with the last point first. Part of the reason
12 we're here is because Rothschild has repeatedly ignored an
13 existing covenant. We don't want another private promise from
14 them. That is why the DJ jurisdiction exists. It's easy for
15 them to break their promise. I imagine it's a lot harder for
16 them to violate a court order.

17 Issues that he raised about what we could have done with the
18 Attorney General, issues about this notion that if we had written
19 an e-mail, then they would have dismissed like they did last
20 time, it is utterly irrelevant to the 12(b)(6) stage. Those are
21 not facts. It's speculation. At best, it's argument that they
22 can save for a later day, after discovery, after we hear from
23 their people, who probably will say what they would have done had
24 things been different.

25 What we are doing here at the 12(b)(6) stage is looking at

1 what actually happened and has Valve plausibly alleged enough to
2 carry the day to get to the next stage, to get to discovery. The
3 answer is yes. We don't have to show or prove or discuss what
4 they would have done. We know what they did.

5 A question that keeps coming up kind of with my team is how
6 many times is enough. Defense counsel says we will give them
7 anything and had they just written another letter or an e-mail,
8 this would have been over. This was the third time. It's a
9 slippery slope to talk about what could have happened if people
10 had done things differently. Because if we go down that road,
11 I'm going to say, well, very likely, Mr. Rothschild and
12 Mr. Meyler, they're going to come back against Valve a fourth, a
13 fifth, a sixth. We don't have to do that. The facts that we
14 have alleged that you see in the complaint get us more than we
15 need to pass the 12(b)(6) stage.

16 I'm going to try to end with this, Your Honor. There was
17 argument about how the fact that Rothschild has filed many
18 lawsuits somehow counts in his favor and relates to the good
19 faith factors. They can argue what they want come summary
20 judgment or trial, but my response to that is it's not true.

21 You see in the complaint the standard operating procedure by
22 Mr. Rothschild is to sue and bail when pressed. The vast
23 majority, and I believe all of them, they don't make it to the
24 merits, they don't make it down the road, because when the
25 defendants stand up and fight and defend themselves, Rothschild

1 and his companies run away. We had that in Texas, again,
2 relating to this same issue.

3 Defense counsel is right, two of those other patents in
4 Rothschild's entities, referred to in Mr. Meyler's letter, they
5 did ultimately sue Valve. They sued valve in East Texas within,
6 I think, about two months of Valve filing this lawsuit. We view
7 them as complete retaliatory actions. Just recently -- and by
8 the way, both parties referenced those cases, which is why I'm
9 talking about them now. Just recently, all of those actions in
10 Texas were dismissed. The magistrate judge agreed with Valve
11 that those cases should never have been filed in East Texas, and
12 Valve is currently seeking sanctions for those very lawsuits. We
13 don't need to go into good faith, they can argue that down the
14 road, but that is not evidence of good faith.

15 Any questions, Your Honor?

16 THE COURT: No. That's it.

17 MR. MACHLEIDT: Thank you for giving me, giving us,
18 giving Valve, the opportunity to present our case.

19 THE COURT: Very good.

20 All right. I'm a firm believer in the moving party getting
21 the last word. So if there's anything that you would like to
22 respond to there that was said, something either outside of your
23 reply or your rebuttal, but if you would like to address any of
24 it.

25 MR. MCPHAIL: Thank you, Your Honor, but I think I have

1 said enough. Thank you very much.

2 THE COURT: Very good.

3 Well, thank you all for coming and arguing. I have been
4 sitting with the briefs. We have got a draft order that we need
5 to complete, so I suspect that we will get an order out fairly
6 soon.

7 I'm looking at the issue here, the threshold issue about the
8 court's jurisdiction, of course, and, you know, I'm not finding
9 any cases with this exact posture. So perhaps this is a one of
10 one, maybe this is that unique case. But you all will have our
11 answer very soon.

12 Is there anything else that you would like to address while
13 we're all convened?

14 MR. MACHLEIDT: No, Your Honor.

15 MR. MCPHAIL: Not from defendants, Your Honor. Thank
16 you.

17 THE COURT: All right. Thank you, all. Take care.
18 Have a good weekend.

19 MR. MACHLEIDT: Thank you, Your Honor.

20 (Adjourned.)

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C E R T I F I C A T E

I, Nickoline M. Drury, RMR, CRR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do certify that the foregoing is a correct transcript, to the best of my ability, from the record of proceedings in the above-entitled matter.

/s/ Nickoline Drury

Nickoline Drury